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In The Supreme Court of The United States

October Term, 1963

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY
In Propria Persona
2420 University Avenue
San Diego, California

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In The

SUPREME COURT OF THE UNITED STATES

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No. ____

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 12, 1963.

CITATIONS TO OPINIONS BELOW

The District Court in and for the Southern District of California rendered judgment against Petitioner, namely,

> "Three (3) years, and execution of sentence is suspended and the defendant is placed on probation for a period of five years on condition, that he obey all laws, Federal State or Municipal, and that he comply with all lawful rules and regulations of the Probation Officer of this Court, and that he does not engage in the business or employment, in any way, of the work of private investigator or detective and that he not use in his business or employment the term 'National Bureau of Investigation' or any other name similar to that of 'Federal Bureau of Investigation', and that he does not repossess automobiles or engage in any other similar business except with the approval of the Probation Officer of this Court."

and entered on September 27, 1962, and attached hereto and marked as "Appendix A". The United States Court of Appeals affirmed said judgment on November 12, 1963, a copy of which is attached hereto and marked "Appendix B".

JURISDICTION OF THE COURT AND STATUTES INVOLVED

Petitioner was convicted of falsely impersonating a member of the Federal Bureau of Investigation, namely, Section 912 of Title 18, United States Code. An appeal therefrom was had to the United States Court of Appeals for the Ninth Circuit. Petitioner now petitions the Supreme Court of the United States under and in pursuance to Rules 22 and 23 of the Supreme Court Rules, and 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

Whether the evidence was sufficient to sustain the conviction. Whether the instructions as given by the District Court to the jury were clear and unambiguous so that an ordinary and prudent person could understand them. Whether the evidence of the prior acts that were introduced were remote, prejudicial or inconsistent, and immaterial to the issues.

STATUTE INVOLVED

Section 912 of Title 18, United States Code.

STATEMENT

Petitioner was employed by a corporation known as the National Bureau of Investigation, which company name had been used for the past 27 years and which was registered in the County of Los Angeles, State of California, (Reporter's Transcript - R. T. p. 164, lines 11 to 25). He was employed by said corporation for a period of seven to ten years (R. T. p. 170, lines 1 to 5).

That the employees of said corporation, including the petitioner, used an identification card, Government Exhibit No. 1, since 1935 (R. T. p. 166, lines 19 to 22). Also, said employees were compelled to carry a badge bearing the name National Bureau of Investigation (R. T. p. 167, lines 11 to 17).

On or about March 13, 1962, petitioner contacted Mr. and Mrs. Reedy (prosecution witness), to ascertain the whereabouts of Mrs. Reedy's father. Petitioner purportedly showed Mr. Reedy an identification card, bearing the name Federal Bureau of Investigation. That petitioner at no time represented orally that he was from the Federal Bureau of Investigation (R. T. p. 73, lines 16-17). The evidence is insufficient to sustain the verdict in the instant case. The only witness from whom the only bit of testimony that the prosecution presented was Mr. Reedy, who stated that he saw petitioner's identification card, bearing the words Federal Bureau of Investigation. Petitioner was dressed in a sport outfit (R. T. p. 6, lines 1 to 2); he was wearing a sport shirt (R. T. p. 77, lines 1 to 2), and was driving a 1961 Oldsmobile F-85 compact automobile (R. T. p. 176, lines 13 to 14; p. 71, lines 11 to 13).

Further, both Mr. and Mrs. Reedy stated that petitioner was present because of repossessing their father-in-law's vehicle (R. T. p. 6, lines 17 to 20), and further, there was discussion concerning the past attempts to repossess their father-in-law's car for non-payment. (R. T. p. 79, lines 19 to 25; p. 83, lines 11 to 14; p. 84, lines 14 to 21; p. 25, lines 1 to 10). Petitioner did not exhibit a gun (R. T. p. 17, lines 1 to 2), nor was there any threat of prosecution (R. T. p. 26, lines 15 through 18; p. 27, lines 23 to 25, and p. 28, lines 1 through 11).

The Reedys then stated that they relied on the impression that petitioner was a member of the F.B.I. and thus gave him this information. This is contradicted not only by petitioner's testimony, but also by the fact that he was invited into the residence before any representations were made (R. T. p. 72, lines 24 to 25; p. 73, lines 1 to 3), and yet the Reedys would not give their father's telephone number to petitioner. (R. T. p. 86, lines 22 to 24).

The main substantial fact, namely, the identification card, was never even inquired into by the special agent for the Federal Bureau of Investigation (R. T. p. 67).

The factor of identification card was substantially controverted not only by the prosecution's evidence, but also by petitioner's evidence, an example of which can be found to the stipulation of the identification card (R. T. p. 10, lines 9 to 23).

Upon petitioner's leaving the premises, Mr. Reedy explained that Mr. Whaley was from the Federal Bureau of Investigation, whereupon Mr. Whaley left the residence. This was the entire premise for said conviction.

Two additional cases were brought in for the purpose of showing intention, which matters were objected to on the basis of irrelevancy, immateriality and remoteness, and which objections were overruled. The first instance took place approximately August 30, 1961, wherein petitioner repossessed a boat from a Mr. Gonzales, and the only testimony here was that at one point the petitioner told the witness he was from the Federal Bureau of Investigation. The boat had already been

repossessed. This witness knew they were repossessing same (R. T. p. 109, lines 13 to 24). There was no reliance hereon, and this testimony was controverted, not only by the defense, but by defense witnesses Eugene B. Swartwood (R. T. p. 184, lines 19 to 21) and by a witness Carl Rosenthal.

Another incident was introduced by a prosecution witness, Mr. Haleen A. Williams, stating that petitioner had represented to him that he was from the National City Police Department. This again was re repossessing a car, the witness knew the car was being repossessed. This again was controverted by a defense witness Swartwood and Mr. Andrew Nossal, who is now a member of the Sheriff's Department of San Diego County. At this instance, the San Diego Police Department was called. No arrests were made. That apparently it was felt by the San Diego Police Department that Mr. Williams was not telling the truth.

Further, the petitioner and Eugene Swartwood testified that they never had a card bearing the words Federal Bureau of Investigation (R. T. p. 183, lines 7 to 11).

In addition, two witnesses were introduced as character witnesses on behalf of the petitioner, Mr. James R. Clifton, an employee of the First National Trust and Savings Bank, and Reilly P. Stearns.

In the light of all this evidence, it is the contention of petitioner that this evidence was insufficient to warrant a conviction. The motion for dismissal was made to the court after the prosecution's evidence was introduced, which motion was taken under submission by the Court, and never decided until all the evidence was

introduced, at which time the Court then denied the motion.

REASONS FOR GRANTING THE WRIT

The Court allowed introduction of prior acts, one of which involved the alleged fact that a Mr. Haleen A. Williams was informed by Petitioner that he (petitioner) was from the National City Police Department. It is contended that this would have nothing to do with the issue at hand. Further, Mr. Williams is an unsavory character, who, since said trial has been indicted for counterfeiting. It is petitioner's contention that the Government should be bound by the type of witness they introduce, in that Mr. Haleen A. Williams was, in fact, perjuring himself for the purpose of instituting a civil suit against petitioner.

The Court had instructed the jury as follows:

At Reporter's Transcript, page 246, lines 16 through 20, the Court states:

> "A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific criminal intent."

Compared to Reporter's Transcript, page 247, lines 15 through 19,

"So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind."

The Court, on the one hand, discussed "intent", and on the other hand discusses the question of "motive". It is also conceded that motive is generally speaking immaterial in a criminal case; however, according to the instructions at Reporter's Transcript, page 246, the court distinctly implies intention and motive to be one and the same thing, and with this, petitioner cannot agree.

The court further instructed the jury at Reporter's Transcript, page 251, lines 10 to 24:

"The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a non-existing office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

It is no defense to assert that a reasonable person should not have been deceived by

> the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous." (Emphasis added.)

inferring that a person can be convicted of this crime whether or not he does make a representation or fails to make a representation - that the important thing is the reliance one places upon a set of circumstances, whether reasonably or unreasonably.

It is contended that this instruction is ambiguous and is "catch as catch can". This is certainly not the law. There are many instructions, where persons may arrive at impressions and conclusions, and would not have the right or the privilege to do so. In the instant case, the petitioner certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation. Federal Detective Bureau Inc. vs. U.S., 77 S.Ct. 1296, 354 U.S. 909.

Also, according to the instructions, the court in effect made the jury partisans rather than judges. When the court instructed the jury that the respect of the federal services was to be maintained, it in effect inferred that if the jury were to acquit the petitioner, that the good name of the Federal Bureau of Investigation would not be maintained. Such may be the object of the law. However, it is the contention of petitioner that such object should not have been put in the instructions, and was not the function of a jury to consider.

The next instruction which the court gave, and to

which petitioner objects, was Reporter's Transcript, page 243, lines 16 through 20:

> "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence." (Emphasis added.)

The only one who could possibly be affected by the verdict would be petitioner, and it is contended that such statement informs that the defendant would be more prone to telling non-truth, and that this would be extremely prejudicial to his case.

Thereafter, the jury, during its deliberation, requested of the Court to define "falsely pretending", which was the CRUX of this case. The Court then instructed the jury by way of example, which can be seen at Reporter's Transcript, page 260, lines 10 through 25; page 261, page 262, page 263 and page 264.

In this instruction, and by way of example, a court in effect stated that a person could be convicted of the herein crime, regardless of any duty that he may have cast upon his shoulders, even though the assumption made by the alleged innocent party was unwarranted. The jury seemed satisfied with this instruction. Thereafter, defense counsel informed the court as to the unreasonableness of his instructions, and the court then recalled the jury and attempted to clear this by a subsequent instruction given (R. T. p. 265 to p. 267). It is contended by the petitioner that such manner of giving instruction was erroneous and extremely prejudicial to

the petitioner, and was so ambiguous that it cannot be seen by petitioner how the jury had any basis on which to arrive at a conclusion.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN WILLIAM WHALEY,

In Propria Persona

APPENDIX A

"Three (3) years, and execution of sentence is suspended and the defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State or Municipal, and that he comply with all lawful rules and regulations of the Probation Officer of this Court, and that he does not engage in the business or employment, in any way, of the work of private investigator or detective and that he not use in his business or employment the term 'National Bureau of Investigation' or any other name similar to that of 'Federal Bureau of Investigation', and that he does not repossess automobiles or engage in any other similar business except with the approval of the Probation Officer of this Court."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 18,678

Nov. 12, 1963

Appeal from the United States District Court for the Southern District of California
Southern Division

Before: JERTBERG and KOELSCH, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

Appellant John William Whaley was engaged in repossessing for the seller or mortgagee automobiles and boats held by the purchaser or mortgagor in violation of the sale or mortgage contract.

He was charged in a one-count indictment under 18 U.S.C. §912 with having in his work impersonated an agent of the FBI, to which charge he pleaded not guilty,

was convicted in a jury trial and was sentenced by the Trial Court to three years imprisonment with execution of sentence suspended and probation for five years ordered.

The Trial Court under 18 U.S.C. §3231 had, and this Court under 28 U.S.C. §§1291 and 1294 has, jurisdiction.

On this appeal, appellant's assigned errors in effect are: (1) That the evidence was insufficient to sustain the verdict; (2) That the Trial Court erred in admitting evidence of prior similar acts which were remote, incompetent and prejudicial; (3) That the Trial Court erred in giving to the jury erroneous instructions prejudicial to appellant; and (4) That the Trial Court erroneously imposed improperly restrictive conditions of probation upon appellant.

As shown by the record and appellee's brief, to support the charges of the indictment, appellee, United States of America, introduced in substance and effect the following evidence: That on March 13, 1962 appellant came to the door of the residence of witness Reedy in San Diego and asked if Mr. Durbin lived there; that upon being told by Reedy that Mr. Durbin was not there, appellant stated he was "a special investigator"; that Reedy then asked what appellant wanted and whether appellant had come to the Reedy home concerning the automobile of Reedy's father-in-law, John Durbin; that appellant stated he had not come regarding repossession of the car, but asked Reedy if he knew where he could contact Mr. Durbin; that Reedy told appellant he did not know where Mr. Durbin was, but that if he did know he would not tell appellant. Mr. Reedy then left the door.

and his wife, Mrs. Reedy, then went to the door, and Mr. Reedy heard her tell the appellant to come in and that she would discuss the matter further, but would not guarantee that she would tell him anything; that the appellant then entered the Reedy home, and all three, the appellant and Mr. and Mrs. Reedy, sat in the front room. When appellant asked Mr. Reedy if he knew it was a federal crime to transport a car across a state line, Mr. Reedy replied that the seller knew that Durbin worked for the federal government; that appellant said that the seller from whom Durbin bought the car "had turned the matter over to us";

That, thereupon, Reedy asked appellant for his credentials; that appellant handed Reedy a leather folder in which he observed a gold badge, the details of which he did not remember; and a card of about 2-1/2" x 3-1/2" in which appellant's picture appeared in the lower left hand corner; that the card also had appellant's name, address, height and color of eyes typed in, and at the bottom of the card were the words "Federal Bureau of Investigation"; that the card appellant showed to Reedy on March 13, 1962 was not Exhibit 1, but was similar to it; that appellant asked Reedy if he and his wife knew they could get into trouble by withholding information; that while Reedy had in his hands the card shown him by appellant on March 13, 1962, Reedy told his wife that "the gentleman was from the FBI and that we might as well tell him, because regardless he was going to find out"; that in response to that statement, appellant said nothing; that Mrs. Reedy then took from her husband the folder presented by appellant, looked at it, returned it to appellant and then left the room and obtained a letter which had Mr. Durbin's post office box address on it which she then related to appellant; that when Reedy

requested his wife to obtain that information for appellant. Reedy believed appellant was an FBI agent, and Reedy would not have requested or allowed this information to be given to appellant had he not had that belief.

Mrs. Reedy testified that she heard her husband, Mr. Reedy, say appellant was an FBI agent; that she then went and found a letter from her father, Mr. Durbin, having his address on it and gave it to appellant, and that she would not have given appellant that information if she had not believed he was an FBI agent, although she said she did not read the card and did not observe on it the words "Federal Bureau of Investigation" but that she took her husband's word for that. Mrs. Reedy also corroborated much of her husband's testimony.

There was in evidence at the close of appellee's case in chief, and is now in evidence, Exhibit 6 which is a letter dated March 13, 1962, from appellant to the United States National Bank, Eugene, Oregon, reporting to the bank the information obtained by appellant from the Reedys and enclosing an invoice, in evidence as Exhibit 7, for a $15.00 charge by appellant's employer, Pacific Coast Claims Adjusters, against the bank. Also in evidence as Exhibit 8 is a paid $15.00 check bearing the Durbin account name and issued by that bank to and endorsed by said employer of appellant.

FBI agent Feldhaus testified that he talked with appellant on June 27, 1962 when appellant said that he could not remember seeing the Reedys on the previous March 13th and that he did not remember any case on John Durbin, but that on June 29, 1962, the day of his arrest, appellant said that his review of the file in the

meantime received from Los Angeles had refreshed his memory and that he was the one who had made the call on the Reedys on March 13, 1962. Further, witness Feldhaus said in effect that he discussed with appellant the kind of identification he carried.

Also in its case in chief, appellee on the limited question of appellant's intent introduced evidence of two prior transactions of appellant when he repossessed a boat and an automobile, and was said by witnesses to have impersonated law officers.

From the foregoing evidence which was before the Trial Court and jury at the close of and in support of appellee's case in chief, it readily appears that such evidence and reasonable inferences to be drawn therefrom were sufficient to sustain a verdict of guilty of the charge as to all its elements, and that without other evidence if both sides had then rested, appellee would have been entitled to have the case submitted to the jury as against appellant's challenge to the sufficiency of appellee's evidence. The Trial Court did not err in overruling appellant's challenge and in denying his motion to dismiss made upon the close of appellee's case in chief.

Thereupon, appellant proceeded with his defense, and himself took the witness stand, denied that he represented himself as from the FBI, testified that for four or five years he had been a private investigator or repossessor and that prior to that he had been a police officer in Los Angeles. Other defense witnesses testified as to the credentials normally carried by private investigators and repossessors and as to appellant's good character. Appellant did not testify nor does he now contend that he was an FBI agent. The evidence

does not show that he was. Instead, it does show he was a private investigator and repossessor. There was then competent evidence from which the jury could properly infer that appellant was not an FBI agent and find that he falsely represented himself to be one.

The evidence supports a finding of the jury that, by means of his FBI impersonation, appellant obtained from the Reedys information concerning the whereabouts of John Durbin, which was of value to him, since as further appears from the record, he was paid $9.00 for his services in the Durbin car repossession matter.

Appellant's further objection to the introduction of evidence of appellant's two prior similar law officer impersonations on the alleged grounds that such evidence was irrelevant, immaterial and remote was carefully considered and overruled by the Trial Court, and we think rightly so. Appellee had the burden of proving criminal intent, and evidence of similar acts occurring reasonably near in time and reflecting intent similar to that charged in this case was clearly relevant and material as throwing light upon and explaining the intent with which the appellant did the things charged against him in the indictment.

Furthermore, we think the Trial Court properly ruled that appellant's two prior acts of impersonation in question were not too remote in time (1) since the first one occurred on August 30, 1961, only about 6-1/2 months before the offense alleged in this case, when the evidence tended to show that appellant succeeded in repossessing a boat after falsely representing himself to be "from the Federal Bureau of Investigation" and "from the FBI", and (2) since the second prior similar

act occurred on January 11, 1962, only 2 months before the offense alleged in this case, when the evidence tended to show appellant repossessed a Thunderbird automobile after falsely representing himself as "National City Police".

We reject appellant's contention of error in the Trial Court's instruction to the jury on criminal intent as that instruction was a correct and clear expression of the law applicable to the subject of, and correctly explaining, criminal intent, and clearly distinguishing it from motive.

We disagree with appellant's contention that the Trial Court's probation condition prohibiting appellant from engaging in the repossession business is unreasonable and improper. The occupational activity prohibited in the probation condition is the one in which appellant was engaged when he committed the offens of which he stands convicted. The probation condition certainly related to the crime with which he was charged. Naturally probation is upon condition that a law violator not repeat his offense. A reasonable if not the best way to prevent recurrent similar offenses is to withdraw from appellant the privilege of engaging in the repossession business where the temptation to impersonate law officers is most likely to occur. The Trial Court committed no error respecting the probation conditions.

There can be no question in this case but that, both at the close of appellee's case in chief and at the close of all the evidence, there was substantial evidence to support a verdict of guilty; and in that connection the Government is entitled to have the Court take the view of the evidence most favorable to the Government. The

Supreme Court has held that

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (citing).

Glasser v. United States, 315 U.S. 60, 80, 86 L.ed 680, 704. Likewise, this Court has ruled

> "While there is some conflict in the testimony, we must view the evidence in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. If, viewed in this light, there is substantial evidence to support the jury's verdict, it must be sustained".

Bolen v. United States, 9 Cir., 1962, 303 F.2d 870, 874.

In this case, finding no error in the Trial Court's action, we Affirm.

(Endorsed) Opinion Filed Nov. 12, 1963.

Frank H. Schmid, Clerk.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN WILLIAM WEAVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR,
Solicitor General,
EDWARD J. WILLIAMS, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 705

JOHN WILLIAM WHALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Southern District of California, of impersonating an agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 912 (R. I, 2; 16). He was sentenced to imprisonment for three years, but execution of the sentence was suspended and he was placed on probation for five years (R. I, 20; Pet. App. 13). On appeal (R. I, 22-23) the conviction was affirmed (Pet. App. 14-21). The judgment of the court of appeals was en-

tered on November 12, 1963. The petition for a writ of certiorari was not filed until December 26, 1963 and is therefore out of time under Rule 22-2 of this Court. The issues raised in the petition do not in any event merit review by this Court.

Evidence for the government showed that on March 13, 1962 petitioner came to the door of Mr. Reedy's home in San Diego, stated he was a special investigator, and asked for the address of Mr. Durbin, Reedy's father-in-law (R. II, 4-6). Reedy asked if petitioner had come in connection with defaulted payments on Durbin's car, but petitioner stated that his mission was not repossession of the car. Reedy stated that even if he did know where Durbin was, he would not tell petitioner (R. II, 6-7). Mrs. Reedy then came to the door and permitted petitioner to enter the house when he displayed a badge (R. II, 7, 69). When petitioner asked Reedy if he knew it was a federal crime to transport a car across a state line, Reedy answered that the seller of the car knew that Durbin worked for the federal government in different states (R. II, 8). Petitioner said that the place where Durbin had bought the car "had turned the matter over to us" (R. II, 9). Petitioner asked Reedy if he knew he could get in trouble by withholding information (R. II, 12). When asked for his credentials petitioner handed to Reedy a leather folder, in which Reedy observed a gold badge and a card about 2½ inches wide by 3½ inches long in which petitioner's picture appeared in the lower left-hand corner. The card also had petitioner's name, address, height, weight, and color of eyes typed on it, and the

bottom of the card read "Federal Bureau of Investigation" (R. II, 9-10). Reedy identified Gov. Ex. 1, as being similar in size to this card, but stated that it was not the same card (R. II, 11). While Reedy held petitioner's credentials, he told his wife that "the gentleman was from the FBI and that we might as well tell him, because regardless, he was going to find out" (R. II, 11-12, 73, 90). Mrs. Reedy looked at the credentials, left the room, and obtained a letter which contained Durbin's post office box address, which she then related to petitioner (R. II, 12-13). After petitioner obtained this information, Mrs. Reedy asked how he would communicate with Durbin. Petitioner answered that "they" would send Durbin a telegram and have him get in touch with "our" office, and that by the time "we" get in touch with people in cases like this "the charges are dropped" (R. II, 13-14). Petitioner's employer was paid $15.00 by a bank for Durbin's address; of this amount petitioner received $9.00 (R. II, 201-202).

The government was permitted to introduce evidence of two similar acts by petitioner for the limited purpose of showing his intent and state of mind at the time of the alleged impersonation (R. II, 99-101, 116, 248-249). On August 30, 1961, shortly after

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[1] Gov. Ex. 1, taken from petitioner at the time of his arrest by an FBI agent on June 29, 1962, was an identification card with petitioner's picture, vital statistics and "National Bureau of Investigation" imprinted on it (R. II, 63, 64). Petitioner's credentials as an insurance investigator were of the same general type and similar in size to those used by FBI agents (R. II, 16).

petitioner's partner had driven off with a repossessed boat taken from the vicinity of the apartment of one Gonzalez, petitioner told Gonzalez he was from the Federal Bureau of Investigation and showed him a card when Gonzalez asked to see his credentials (R. II, 94-97, 103). On January 11, 1962, in repossessing the Thunderbird car of one Williams, petitioner flashed a badge and card at Williams and stated "National City Police" (R. II, 116-121).

In testimony given on his own behalf, petitioner stated that he showed the Reedys Gov. Ex. 1 (the National Bureau of Investigation identification card) and his investigator's badge, but that he did not have with him a card or badge identifying him as a member of the FBI (R. II, 198-200). Petitioner testified that it was after (not before) Mrs. Reedy had given the information as to Durbin's address that Reedy said to his wife, "Honey, you had to tell him. He is from the FBI" (R. II, 201). As to the two incidents involving repossessions, petitioner denied that he represented to Gonzalez that he was a member of the FBI (R. II, 214) and that he identified himself to Williams as a member of the National City Police Department (R. II, 209-210).

1. The sufficiency of the evidence is not an issue warranting review by this Court. The jury had a right to credit the testimony of Mr. and Mrs. Reedy that petitioner informed them that a possible federal crime by Durbin was involved, admonished that they could get in trouble by withholding information, and displayed his badge and an identification card bearing the legend "Federal Bureau of Inves-

tigation". This was a false representation by petitioner that he was an FBI agent, even though there is no testimony that petitioner expressly claimed this status. Petitioner, according to the testimony, was aware that the Reedys believed he was an FBI agent, yet did nothing to correct this belief. By reason of his false pretense, petitioner obtained Durbin's address—a thing of value—imparted this information to his employer and received a fee for his services. Thus a clear violation of the statute resulted.

2. Evidence as to the two prior similar law officer impersonations was relevant and material in explaining the intent with which petitioner committed the act charged against him in the indictment. *Nye & Nissen v. United States*, 336 U.S. 613, 618; 2 Wigmore on *Evidence* (3rd Ed. 1940) §§ 302-304. By instructions given both at the time this evidence was admitted and in its charge, the court properly limited this evidence to the question of petitioner's intent (R. II, 99-101, 116, 248-249). The two transactions were not too remote in point of time, the earlier one having occurred only about 6½ months prior to the offense charged.

3. There is no merit to petitioner's contention that certain parts of the court's charge to the jury were erroneous.

a. Petitioner quotes part of the court's charge (Pet. 7-8) as implying that intent and motive are synonymous. The omitted part of the charge, appearing between the two quoted excerpts, reads (R. II, 247, lines 8-10):

> Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted.

b. There is no valid ground for complaint as to the part of the charge (R. 243) directing the jury to consider "the manner in which each witness might be affected by the verdict" (Pet. 9-10). Petitioner's interest in the outcome was a proper factor for the jury to consider in determining his credibility.

c. The judge's general explanation of the purpose of the statute (R. II, 251, Pet. 8-9) did not imply that a conviction was possible even if the accused had not falsely pretended to be a federal officer. Moreover, shortly thereafter, he set out the three essential elements which must be proved (R. II, 252):

> First: The act or acts of falsely pretending to be an officer or employee acting under the authority of the United States;
>
> Second: Demanding or obtaining some thing of value while acting in such pretended character; and
>
> Third: Doing such act or acts knowingly and wilfully with the intent to deceive or to defraud another.

d. Before the jurors returned their verdict, they sent a written communication asking for the court's interpretation of "(a) letting the impression stand that he is a FBI man; (b) falsely pretending" (R. II, 259). The court then gave the jury examples of how a person might falsely pretend to be another by reason of what he was wearing or carrying, or by

reason of his actions, without making a verbal statement. The court also explained that the crux of the matter was not whether the petitioner intended to deceive the Reedys into believing he was an FBI agent when he left their house, but whether he intended to deceive them in order to induce them to give the information sought (R. II, 260-264). Later, after the court had discussed the question of false pretense with counsel, the jury was recalled (R. II, 265). After stating that by the time petitioner left the house he knew that the Reedys thought he was an FBI officer, the court charged (R. II, 266-267):

> But the question in your minds, the crucial thing is, when was there any false pretense, if there was? When did the defendant, with guilty intent, create that impression, if he did? He might not have created it with a guilty mind at all. But in order to be guilty of this crime, he must have the guilty state of mind in endeavoring to get the thing of value, namely, the information. He must have the criminal intent at that time, at the time he seeks the information, and gets that information. That's the crucial time. And that is what I wanted to emphasize.

The court then asked if there were anything further and both petitioner's counsel and government counsel stated "Nothing further" (R. II, 267). The quoted excerpt is a correct statement of the law; it required a finding of petitioner's criminal intent at the time he sought and obtained the information through the ruse of his false pretense.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1964

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No. 705

In The Supreme Court of The United States

October Term, 1963

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S ANSWER TO RESPONDENT'S MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

JOHN WILLIAM WHALEY
In Propria Persona
2420 University Avenue
San Diego, California

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

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JOHN WILLIAM WHALEY,

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PETITIONER'S ANSWER TO RESPONDENT'S MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

I

The only Government evidence introduced which in any way related to the fact that petitioner represented himself to be a member of the Federal Bureau of Investigation, was the fact that he allegedly presented a card bearing the name Federal Bureau of Investigation. However, the evidence shows that apparently this fact was never even deemed material by the investigating officers

for the Government, as Petitioner was never asked whether or not he presented such a card, or even had such a card. (RT 67). Also, the Government investigators, without notice to Petitioner and with his consent, searched his office and found no such cards. However, they did find cards bearing the name National Bureau of Investigation, which was the name of Petitioner's employer, which name had been registered in the State of California and was lawfully used.

Secondly, the additional "prior acts" that the Government introduced was one dealing with an alleged representation that Petitioner was a member of the National City Police Department. This matter had been reviewed by the local Police Department and was dropped because there was no basis for belief that such statement was made; and, secondly, a witness on behalf of Petitioner who was present at that time was a member of the Sheriff's Department of the County of San Diego, who stated that no such statement was made. Thirdly, the Prosecution witness who testified to this fact has subsequently been indicted and convicted of defrauding citizens of the State of California, and also who has been indicted by the Federal Government for counterfeiting money. This individual is an irresponsible and perjurious individual and was used by the Government for purposes of [illegible]nging in this evidence.

II

In reviewing the instructions given by the Court, the Court had given various examples for purposes of explaining to the jury what is meant by false pretenses. Petitioner's attorney, after the jury had left for deliberation, discussed the matter with the Court and the

Court then recalled the jury to explain the situation further. There was nothing else that Petitioner's attorney could do, and it is felt by Petitioner that the instructions as given by His Honor Judge MATHIAS were not correct and accurate statements of the law.

III

Petitioner now desires to argue a point which Petitioner's attorney did not do at the Circuit Court of Appeals level, and that is, that at the time of the motion for a new trial, Petitioner's attorney presented evidence to the effect that a discussion had taken place between two jurors in the hallway stating that they were friendly with the District Attorney of San Diego County, and were discussing the herein case in an extremely biased and prejudicial manner. This evidence was presented to the Court at the time of the motion for a new trial (for the purpose of impeaching the jurors) wherein the Court coerced Petitioner's counsel to withdraw the argument re bias and prejudice of the jurors, because the Judge stated that if Petitioner's attorney wanted to press this issue, he would immediately incarcerate Petitioner in jail and continue the hearing of the motion for a few weeks. For the purpose of avoiding this immediate incarceration, Petitioner's attorney withdrew his argument. Petitioner now contends that such coercive measure of the Court deprived him of having the matter fully heard, and that to use jail and incarceration as a means of having a matter heard was unjust, and a deprivation of his rights. Further, Petitioner contends in all honesty that this type of conduct was manifest through the entire trial, although the record does not show the same. Petitioner is requesting of

the Court Reporter to have the transcript made and prepared re motion for a new trial, to show the Supreme Court what had actually taken place.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted and that Petitioner be given a "fair, just, and full" hearing in this matter.

JOHN WILLIAM WHALEY
In Propria Persona

No. 705

Office-Supreme Court, U.S.
FILED
MAR 12 1964
JOHN F. DAVIS

In The Supreme Court of The United States

October Term, 1963

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN WILLIAM WHALEY
In Propria Persona
2420 University Avenue
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 705

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of February 17, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the 9th Circuit in the above-entitled case as prayed for in the petition filed December 26, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of February 17, 1964, a copy of the transcript re: motion for a new trial, was not presented to the Court. Petitioner now has said transcript, the pertinent copies of which are attached hereto marked Exhibit "A". It can be seen from this transcript that the Court, in fact, coerced Petitioner's attorney to withdraw his motion for a new trial because of the threat of incarcerating Appellant in jail immediately. There was no other reason for such withdrawal of said motion. Petitioner contends that the entire merit his attorney was making concerning the prejudice of the alternate jurors should have been fully heard, and the Court was neither legally nor morally correct in coercing the situation. This can be particularly noted on Page 11, lines 23-25; Page 12, lines 1-14; Page 12, lines 22-end; Page 13, lines 1-3; and Page 15, lines 2-8.

2. Petitioner further contends that S. A. WILLIAMS, who testified on behalf of the Government, was, in effect, a criminal, a liar, and unworthy of belief and should not even have been allowed to take the stand in the herein case. For purposes of corroborating this, Petitioner attaches a copy of a newspaper report marked Exhibit "B".

CONCLUSION

For the reasons set forth above and in petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the 9th Circuit.

Respectfully submitted,

John William Whaley
In Propria Persona

I hereby certify that the foregoing petition for rehearing is precented in good faith and not for delay, and is restricted to grounds specified in Rule 58 in the rules of this Court.

John William Whaley,
Petitioner
In Propria Persona

SAN DIEGO, CALIFORNIA, FRIDAY, OCTOBER 5, 1962, 11:00 A. M.

- - -

(Other court matters.)

THE CLERK: No. 2 on the calendar, Case No. 30993, United States of America v. John William Whaley.

THE COURT: John William Whaley, is that your full, true name?

DEFENDANT WHALEY: Yes, sir.

THE COURT: Mr. Rock Zaitzow who stands at the Bar with you is your attorney?

DEFENDANT WHALEY: Yes, sir.

THE COURT: Do you wish to argue the motion for new trial, Mr. Zaitzow?

MR. ZAITZOW: If the court will allow me to.

THE COURT: Yes. Certainly.

MR. ZAITZOW: First of all, let me inform the court that I come in here, I think, the day before D-Day arrived, the five-day period, and consequently in quite a hurry, and I understand from Mr. Enstrom, and I wish to apologize - apparently my secretary did not send him a copy of the written motion. I wish to put the court on notice of that at this time.

(Other court matters.)

THE CLERK: No. 2 on the calendar, Case No. 30993, United States of America v. John William Whaley.

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DEFENDANT WHALEY: Yes, sir.

THE COURT: Do you wish to argue the motion for new trial, Mr. Zaitzow?

MR. ZAITZOW: If the court will allow me to.

THE COURT: Yes. Certainly.

MR. ZAITZOW: First of all, let me inform the court that I come in here, I think, the day before D-Day arrived, the five-day period, and consequently in quite a hurry, and I understand from Mr. Enstrom, and I wish to apologize -- apparently my secretary did not send him a copy of the written motion. I wish to put the court on notice of that at this time.

THE COURT: Very well. Well, the Government is always ready

MR. ENSTROM: I had an opportunity yesterday

afternoon to look at the motion, your Honor, in the clerk's office.

THE COURT: Very well.

MR. ZAITZOW: The mostimportant things I wish to argue are two matters, if the court please, and I will not take too much time on this.

No. 1 is concerning the jurors involved in the matter.

I have a witness here who had told me after I returned from Santa Maria as to what has been put in that motion. If the court desires to have him put under oath and tell his story to the court, he is here now and ready and accessible to be heard.

As to the other statement concerning the juror, whose name I presently forget, but he was the second alternate juror, the witness who would testify to that statement would be the defense attorney in this matter, namely, Rock Zaitzow. And if the court desires to have him depos d and put under oath, he would be happy to make himself accessible at that time.

There is no use arguing or going further into those matters, as I think they are clearly put into the situation.

THE COURT: Very well.

MR. ZAITZOW: The most important things I wish to argue are two matters, if the court please, and I will not take too much time on this.

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There is no use arguing or going further into those matters, as I think they are clearly put into the situation.

THE COURT: Well, now, you say that the alternate jurors --

MR. ZAITZOW: If the court please, I cannot hear the court -- especially when the court has his mouth covered up. I am terribly sorry. Thank you.

I cannot hear you, your Honor.

THE COURT: I don't cover my mouth. Why do you make such a remark as that?

MR. ZAITZOW: I didn't mean to be rude. I thought the court was talking, and I couldn't hear what you were saying, sir.

THE COURT: If you can't hear me, say so.

Do you hear me now?

MR. ZAITZOW: Yes, I hear you now.

THE COURT: Very good. I am sorry you weren't able to hear me.

I say the first proposition you make is that the alternate jurors were overheard during the trial discussing car repossession, and the alternate juror finally chosen and entered the jury room was heard to say, to the effect, that he did not approve of auto repossessors and would not believe them.

Now, how do you expect to prove that?

MR. ZAITZOW: The only thing I intend to do is

covered up. I am terribly sorry. Thank you.

I cannot hear you, your Honor.

THE COURT: I don't cover my mouth. Why do you make such a remark as that?

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Do you hear me now?

MR. ZAITZOW: Yes, I hear you now.

THE COURT: Very good. I am sorry you weren't able to hear me.

I say the first proposition you make is that the alternate jurors were overheard during the trial discussing car repossession, and the alternate juror finally chosen and entered the jury room was heard to say, to the effect, that he did not approve of auto repossessors and would not believe them.

Now, how do you expect to prove that?

MR. ZAITZOW: The only thing I intend to do is to tell the court what this person told me, and put him under oath and let him tell the judge this.

THE COURT: Then you say that "The alternate juror

was overheard to say that he sat in Superior Court and was always removed as a prospective juror in that he was a close associate of one Don Killer, District Attorney of the County of San Diego."

MR. ZAITZOW: Yes, sir.

THE COURT: Well, how do you expect to prove that?

MR. ZAITZOW: Again, by testimony of a particular individual who heard that.

THE COURT: You don't say which alternate juror.

MR. ZAITZOW: I do not remember their names. The second alternate juror who was not in the jury room.

THE COURT: In other words, B applies to the alternate juror who did not serve at all?

MR. ZAITZOW: Yes, sir. That is why it was never presented. This was overheard. The court had instructed and admonished the jury on several occasions, and rightfully so, that they should not discuss the case with anyone. Also, the court had asked respective questions of the jurors in the initial stages concerning any acquaintance -- I forget how the court stated it -- concerning acquaintanceship with any law enforcement agency, federal, state, [illegible]

was a close associate of one Don Killer, District Attorney of the County of San Diego."

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MR. ZAITZOW: Yes, sir. That is why it was never presented. This was overheard. The court had instructed and admonished the jury on several occasions, and rightfully so, that they should not discuss the case with anyone. Also, the court had asked respective questions of the jurors in the initial stages concerning any acquaintance -- I forget how the court stated it -- concerning acquaintanceship with any law enforcement agency, federal, state, local, et cetera, I think, and the answer given by all jurors, including the two alternate jurors, were to the negative.

THE COURT: Well, of course, that might be a contempt of court. But the alternate juror never participated in the verdict.

MR. ZAITZOW: That is true. And that is why when the witness who overheard the alternate juror make these statements, which witness was myself, I felt that at the time that he could not hurt the case because he was out in the hallway rather than in the jury room with his fellow jurors.

THE COURT: You mean you heard him say this?

MR. ZAITZOW: I sure did.

THE COURT: Why didn't you tell me at the time?

MR. ZAITZOW: Well, at that time, your Honor, itwas at the time when the juror took ill, the other juror went in, and we were walking back and forth across the hall, and it was the feeling of defense counsel that even while he was making this remark to apparently one of the husbands of one of the jurors, that it would be unprejudicial to the defense, as he was out in the hallway and not in the jury room.

THE COURT: So that leaves only A. B could not serve as a ground then, subdivision B, ground 2 of

cipated in the verdict.

MR. ZAITZOW: That is true. And that is why when the witness who overheard the alternate juror make these statements, which witness was myself, I felt that at the time that he could not hurt the case because he was out in the hallway rather than in the jury room with his fellow jurors.

THE COURT: You mean you heard him say this?

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THE COURT: Why didn't you tell me at the time?

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THE COURT: So that leaves only A. B could not serve as a ground then, subdivision B, ground 2 of your motion.

Let's take a look at A. Who is this that overheard that statement?

MR. ZAITZOW: This gentlemen here, sir, (indicating).

THE COURT: Do you know him?

MR. ZAITZOW: Do I know him personally?

THE COURT: Yes. I mean, who is he?

MR. ZAITZOW: He was a witness in our case, and a witness who was here.

THE COURT: A witness for whom?

MR. ZAITZOW: A witness for the defendant.

THE COURT: Was he here during the deliberations of the jury?

MR. ZAITZOW: No, sir. He returned at one particular time. He returned, from what I understand, around dinnertime. I am not sure of the juror's name. It was either Arrebui or Arregui.

THE COURT: Well, the alternate whom you chose and the defendant chose.

MR. ZAITZOW: That is true.

THE COURT: This man never told you about it during the trial?

MR. ZAITZOW: Sir, from the information he gave me he had heard the statements made, and I had gone, and

THE COURT: Do you know him?

MR. ZAITZOW: Do I know him personally?

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MR. ZAITZOW: That is true.

THE COURT: This man never told you about it during the trial?

MR. ZAITZOW: Sir, from the information he gave me he had heard the statements made, and I had gone, and he didn't get in touch with me -- the next day he could not get in touch with me because, obviously, I was out of town and did not return until I came to their office next

week to speak with the defendant's wife. And he came and we started talking. And he told me what, in the course of many statements, he had overheard. And I asked him why he didn't tell me this, and he said he didn't think it was that important. And I told him I thought differently and it should be presented to the court, and brought to the court's attention.

THE COURT: How does the Government view this matter?

MR. ENSTROM: May I inquire of the clerk's file for a moment to look at this ground? Or if there is an extra copy available --

THE COURT: You see, that's the difficulty of these matters that come up after a verdict. The jurors themselves are not permitted to stultify their verdict.

MR. ENSTROM: The matter is certainly very vaguely put and isn't placed before your Honor in the form which I think is supported by affidavit that the rule requires. In this form I don't think that it is a ground for the granting of the motion that is requested.

THE COURT: Whom did the alternate say this to?

MR. ZAITZOW: Whom did the alternate say this to?

course of many statements, he had overheard. And I asked him why he didn't tell me this, and he said he didn't think it was that important. And I told him I thought differently and it should be presented to the court, and brought to the court's attention.

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MR. ENSTROM: The matter is certainly very vaguely put and isn't placed before your Honor in the form which I think is supported by affidavit that the rule requires. In this form I don't think that it is a ground for the granting of the motion that is requested.

THE COURT: Whom did the alternate say this to?

MR. ZAITZOW: Whom did the alternate say this to?

THE COURT: Yes.

MR. ZAITZOW: Would the court allow me ten seconds to talk to the witness?

THE COURT: Yes.

MR. ZAITZOW: It is the claim of the witness that this conversation took place between Alternate Juror No. 1 and Alternate Juror No. 2, whom he describes as a man, tall, dressed in a blue suit.

THE COURT: Well, if we retry the matter, it's a question of whether there was any misconduct on the part of the juror -- rather, not whether there was misconduct but whether he was qualified.

MR. ZAITZOW: If the court please --

THE COURT: It really goes to his qualifications rather than -- well, I will put it over, if you wish me to, until the 30th of October, and I will hear the evidence on it. But I wouldn't attempt to decide it without having all parties and witnesses here and let them give their version of it.

What is your witness' name?

Mr. Clerk, who were the alternate jurors? I don't have my notes here.

MR. ZAITZOW: His name is Eugene Swartwood.

THE COURT: He testified at the trial.

MR. ZAITZOW: Yes, sir.

that this conversation took place between Alternate Juror No. 1 and Alternate Juror No. 2, whom he describes as a man, tall, dressed in a blue suit.

THE COURT: Well, if we retry the matter, it's a question of whether there was any misconduct on the part of the juror -- rather, not whether there was misconduct but whether he was qualified.

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What is your witness' name?

Mr. Clerk, who were the alternate jurors? I don't have my notes here.

MR. ZAITZOW: His name is Eugene Swartwood.

THE COURT: He testified at the trial.

MR. ZAITZOW: Yes, sir.

THE CLERK: The first alternate juror was Alfonso Arregui and the second alternate juror was Albert Ambler.

THE COURT: Does Mr. Swartwood say that there is anyone else who could possibly have overheard this conversation?

MR. ZAITZOW: With the court's permission, one more minute.

(Discussion outside the hearing of the reporter.)

MR. ZAITZOW: Your Honor, I was just talking to Mr. Swartwood and he informs me that he was walking out with a person by the name of Charlie, who was ahead of him, and he was lagging behind when this happened. And he doesn't know if Charlie heard this or not.

THE COURT: Who is Charlie? Charlie who?

MR. ZAITZOW: A man by the name of Charlie Rhoades. Defense counsel does not know who he is. However, the court places me again in this position, if the court please: My client is in custody. I felt -- I did not bring these facts to the court's attention for the purpose of in any way trying to -- I am at a loss of words trying to accost the court in this manner. I took it on my own after hearing the story to present it to the court. I felt it was my duty as an attorney, not only as a defense attorney on behalf of my client, but as an attorney generally.

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(Discussion outside the hearing of the reporter.)

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However, I understand the predicament I have placed the court in. And yet, with this -- I was cognizant of what the court may have to do, such as delay, but I am

also beset with this, if the court please, that my client is in jail --

THE COURT: He is going to stay there until sentence, too.

MR. ZAITZOW: I know. I would --

THE COURT: I interrupt you just so you will save yourself some time.

MR. ZAITZOW: Yes. I was made cognizant of the court's policy after the trial.

Would the court allow me a couple of minutes to speak with my client?

THE COURT: Yes.

MR. ZAITZOW: I would appreciate it if the court would.

THE COURT: Very well.

(Discussion between counsel and defendant.)

MR. ZAITZOW: Thankyou.

My client informs me that he feels that he wants to get the sentencing today because he feels that this thing has been hanging over his head for many a month. And this is his position.

THE COURT: Well, I won't go ahead with it

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(Discussion between counsel and defendant.)

MR. ZAITZOW: Thankyou.

My client informs me that he feels that he wants to get the sentencing today because he feels that this thing has been hanging over his head for many a month. And this is his position.

THE COURT: Well, I won't go ahead with it unless you want to withdraw your motion for a new trial upon those grounds. I expect to go to the bottom of it. It not only involves this defendant, but it involves the

integrity of the jury process. And if I find that those people falsely answered questions at the time they were impaneled, why, they are in serious trouble, too.

MR. ZAITZOW: I am fully aware of that, and that is why I felt it should be presented to the court.

THE COURT: Of course, those things should be presented before anything can turn on it.

MR. ZAITZOW: Right.

THE COURT: They should be presented before the verdict. They should be presented immediately. The fact that they are presented after an adverse verdict, particularly by a person who is interested, colors the whole matter.

MR. ZAITZOW: I understand that, your Honor.

THE COURT: And you have nothing but the testimony of interested people.

MR. ZAITZOW: Right.

THE COURT: The alternate jurors who are alleged to have said these things, of course, they are interested. The person who reported it after an adverse verdict is interested.

MR. ZAITZOW: That is very true.

impaneled, why, they are in serious trouble, too.

MR. ZAITZOW: I am fully aware of that, and that is why I felt it should be presented to the court.

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MR. ZAITZOW: I understand that, your Honor.

THE COURT: And you have nothing but the testimony of interested people.

MR. ZAITZOW: Right.

THE COURT: The alternate jurors who are alleged to have said these things, of course, they are interested. The person who reported it after an adverse verdict is interested.

MR. ZAITZOW: That is very true.

THE COURT: Whereas, if he had reported it prior to the verdict, he would be in the position of a relatively disinterested person. No one knows how those matters are

going.

MR. ZAITZOW: I cannot help but agree with the court. But I hope the court understands my position in bringing this forward to the court.

THE COURT: I think you should have said something about that other juror the other night.

MR. ZAITZOW: For the record, I was debating that with my client when we were walking down the hallway together, and it was my own determination -- and I take this fully on my own shoulders -- that when we arrived at the conclusion, you remember in the trial when the court was kind enough to allow defense counsel to choose between Alternate Juror No. 1 and Alternate Juror No. 2, and defense counsel made the decision to choose Alternate Juror No. 1, and then when this was heard thereafter I remember deliberating about presenting this to the attention of the court, and to advising my client that, "Thank goodness, we didn't choose Alternate No. 2," after hearing his remarks. If one more juror had been taken ill, I could assure the court very readily that this would have been brought to his attention at that time.

But notwithstanding those factors, I do not want

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But notwithstanding those factors, I do not want to place my client in the position of waiting another three weeks for this, so I will withdraw that situation on the basis for a new trial.

Will the court allow me to go on on more point?

THE COURT: You wish to withdraw now any motion for a new trial based upon any claimed misconduct or disqualification of any juror or alternate, is that correct?

MR. ZAITZOW: Yes, sir.

THE COURT: Is that your desire? Do you understand that, Mr. Whaley?

DEFENDANT WHALEY: Yes, sir.

THE COURT: I expect to have the matter investigated in any event.

Mr. United States Attorney, I expect this matter to be fully investigated and, if the investigation warrants, in your judgment, I want a hearing on the 30th of October.

MR. ENSTROM: Yes, your Honor.

THE COURT: I want to hear all the witnesses.

MR. ZAITZOW: Let me state on that proposition that upon giving just half reasonable notice, defense counsel will make himself readily available.

THE COURT: October 30th. We will set it for 1:30 in the afternoon, October 30th.

Now, you let Mr. Zaitzow know if your office concludes it warrants any further investigation and

for a new trial based upon any claimed misconduct or disqualification of any juror or alternate, is that correct?

MR. ZAITZOW: Yes, sir.

THE COURT: Is that your desire? Do you understand that, Mr. Whaley?

DEFENDANT WHALEY: Yes, sir.

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Now, you let Mr. Zaitzow know if your office concludes it warrants any further investigation and further hearing.

MR. ENSTROM: Yes, your Honor.

THE COURT: Interview everyone, and have everyone

3 Found Guilty Of Counterfeit Bill Charges

By TIM SHEPARD

A federal court jury yesterday found two brothers and a toy designer guilty of counterfeiting $128,000 in $20 bills.

Each defendant faces a possible sentence of 65 years when he appears for sentencing before U.S. District Court Judge James M. Carter March 30.

The jury convicted one of the brothers — Shafaeh (Doc) Ashook Williams, 50, of 515 Dewey St. — although the other two defendants tried to take the blame.

Codefendants are Edward Williams Ashook, 47, of 2971 Calle Cumble, and Richard Hashagen, 39, a toy designer of 5727 Rancho Hills Dr. Williams and Ashook are brothers.

4-DAY TRIAL

The jury of six men and six women deliberated for 1½ hours after the four-day trial before finding the defendants guilty of four counts of counterfeiting and one count of conspiracy. The counterfeiting charges are punishable by sentencing up to 15 years each. Conspiracy calls for a 5-year sentence.

Assistant U.S. Atty. Elmer Enstrom called a 13-year-old National City boy as a surprise rebuttal witness to refute defense allegations that all except six bogus $20 bills had been burned by one of the defendants.

Gregory Newell, 13, of 1905 E. Seventh St., National City, told the jury that he found 24 counterfeit $20 bills Feb. 23 while taking a shortcut to his home. The bogus bills were turned over to National City police after the boy found them in a drainage ditch near 10th Avenue and Palm Avenue in National City.

Ashook had testified that he had burned all of the bogus bills last November.

The bogus bills were printed on a rented offset printing press in a rented office on National Avenue, according to Enstrom.

Ashook also testified that he and Hashagen had printed the bogus bills as a lark and slipped them to his brother, Doc Williams, as a joke. They claimed he did not know they were counterfeits.

Enstrom, however, established that six of the bills were passed and that two of them reached the Federal Reserve Bank in Los Angeles before they were detected.

CALLED LEADER

Enstrom pictured Williams as the ring leader. He told the jury it would have to believe that Charles Peyton, Secret Service agent in charge of the local office, was a liar in order to accept the stories of the defendants. The defendants tried to refute confessions they made at the time of their arrest here last November.

Williams and Ashook are brothers, according to Enstrom, although they go by different last names.

Williams was free on $25,000 bail pending appeal on a Los Angeles grand theft conviction at the time of his arrest on the counterfeit charges.